NO. 98726-2

Court of Appeals No. 51414-1-II
Lewis Co. Superior Court Cause No. 14-2-00917-6

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

DARCY L. JOHNSON,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LIQUOR CONTROL BOARD,

Respondent.

AMICUS CURIAE BRIEF OF WASHINGTON DEFENSE TRIAL LAWYERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

OTHER AUTHORITIES

I. IDENTITY AND INTEREST OF AMICUS

The Washington Defense Trial Lawyers Association (WDTL), established in 1962, includes more than 750 Washington attorneys engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its member is through amicus curiae submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients. The petition in this case implicates applicable concerns for WDTL, whose members have an interest in the preservation of common law principles of premises liability.

II. ARGUMENT

Washington cases have uniformly applied the Restatement (Second) of Torts § 343 to cases analogous to the one before the Court. The rationale for the narrow *Pimentel* exception to the notice rule is not applicable to conditions inherent in all business regardless of their specific mode of operation. Instead the exception is based on the defendant's choice of a method of operation that increases the probability of hazardous conditions over a safer alternative method of operation. To date, the only

operations found to fulfill this test have been certain types of self-service operations. The general possibility that visitors to a building will track in water or other materials on their shoes is a risk inherent in any business open to the public and, unlike self-service shopping, is no doubt a risk anticipated in the development of traditional tort law.

Because the *Pimentel* exception does not apply, principles of stare decisis require adherence to precedent unless it can be shown to be both incorrect and harmful. Here, the general rule is neither incorrect nor harmful. It provides property owners with clear incentives to respond appropriately to known conditions and to make reasonable efforts to discover unknown hazards. Expanding liability would increase the litigation and settlement costs of struggling brick-and-mortar business, restaurants, and entertainment venues while doing nothing to enhance safety.

A. The *Pimentel* Exception is Premised on the Existence of a Situation not Anticipated by Traditional Tort Law

The *Pimentel* exception originated with a notion that traditional premises liability rules did not account for the risks of a modern world where shoppers picked out their own goods in a store rather than simply handing a shopping list to clerk. Commenting on the then current state of the law, the *Pimentel* court stated: "[t]he predominant theme running

through these cases appears to be that modern techniques of merchandising necessitate some modification of the traditional rules of liability." *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 46, 666 P.2d 888, 892 (1983).

Specifically, this newfangled practice of allowing mere amateurs to select the items they wished to consume or purchase was argued to be a dangerous money-saving scheme justifying enhanced liability in exchange for the savings and profits realized:

> Plaintiff and amicus, on behalf of Washington State Trial Lawyers Association, argue, and the court below held, that the *Ciminski* rule applies to all self-service operations. The rationale for such a holding is explained by the Court of Appeals as being that "a business that chooses to adopt the self-service merchandising technique which allows for lower overhead and greater profits, is in a better position to accept the risks involved". *Pimentel v. Roundup Co.*, 32 Wash.App. 647, 651–52, 649 P.2d 135 (1982).

Pimentel, 100 Wn.2d at 46. *See also, Iwai v. State, Employment Sec. Dep't*, 129 Wn.2d 84, 99, 915 P.2d 1089, 1096 (1996) (plurality) (stating that "customers are naturally not as careful in handling the merchandise as clerks would be").

Though the *Pimentel* exception has to date been limited to certain self-service situations, the actual rule was more abstract and general:

> This [ruling] does not change the general rule governing liability for failure to maintain premises in a reasonably safe condition: the unsafe condition must either be caused

> by the proprietor or his employees, or the proprietor must have actual or constructive notice of the unsafe condition. Such notice need not be shown, however, ***when the nature of the proprietor's business and his methods of operation are such*** that the existence of unsafe conditions on the premises is reasonably foreseeable.

Pimentel, 100 Wn.2d at 49 (emphasis added). Although the above language allows for extending the *Pimentel* rule beyond self- service scenarios, no Washington case has yet presented another premises liability scenario involving a distinct chosen method of operation that would justify departing from the traditional rule. Examples of potential extensions of this "mode of operations" rule cited by scholars include a "bar that allows patrons to bring drinks onto the dance floor," or a fast-food restaurant that allows patrons to carry their food to their table. William Brekka, *Extending the Mode-of-Operation Approach Beyond the Self-Service Supermarket Context*, 48 New Eng. L. Rev. 747, 764 (2014). But such potential expansions of the rule cannot logically extend to situations where the "harm stems from conditions caused by third parties that are inherent in nearly all businesses" such as a plaintiff slipping and falling in an entryway due to normal use of the premises during wet weather. *Id.* at 767.

Having a door for the public to enter and being open on rainy days are not peculiar to the nature of any proprietor's business or method of

operation. Instead, they are baseline features of substantially all businesses with premises open to the public. The concern that underpinned and gave rise to the *Pimentel* exception was that there was something new, modern, or different about the particular store's method of business, which necessitated modification of the traditional rules of liability. But it is plain that there are no such concerns at issue in this case, and that the rationale for the *Pimentel* exception cannot logically be extended to the facts of this case.

B. The Principle of Stare Decisis Favors Adherence to the Traditional Rule

Because the *Pimentel* exception is inapplicable, dispensing with the notice test under the facts of this case would constitute reversal of existing case law adopting the notice rule and therefore raises stare decisis considerations. The principle of stare decisis provides stability in the common law and precludes re-decision of decided issues as if they were cases of first impression:

> In Washington, stare decisis protects reliance interests by requiring " '**a clear showing that an established rule is incorrect and harmful before it is abandoned**.' " *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) [citations omitted]. The substantive restraints placed on courts to "not only heed the relevant judicial past in arriving at a decision, but also to arrive at it within as straight and narrow a path as possible," ordinarily produces changes in the law "with a minimum of shock to those who act in reliance upon judicial decisions." Roger J. Traynor, *Quo*

> *Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L.J. 533, 537 (1976). The constraints of stare decisis prevent the law from becoming "subject to incautious action or the whims of current holders of judicial office." *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1920). Although stare decisis limits judicial discretion, it also protects the interests of litigants by providing clear standards for determining their rights and the merits of their claims. Therefore, overruling prior precedent should not be taken lightly. *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997).

Lunsford v. Saberhagen Holdings, Inc., 166 Wn.2d 264, 278, 208 P.3d 1092, 1099–100 (2009) (emphasis added). This Court also recently observed: "we can reconsider our precedent not only when it has been shown to be incorrect and harmful but also when the legal underpinnings of our precedent have changed or disappeared altogether." *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 729–30, 381 P.3d 32, 39 (2016) (citing *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014)).

Here, the traditional notice rule, established in both the Restatement (Second) of Torts § 343 and in decades of case law, has not been shown to be incorrect or harmful. The rule provides obvious benefits in terms of both encouraging reasonable behavior by potential defendants and in promoting fair decisions on liability. The rule provides solid incentives for landowners to rectify known problems and for making

reasonable efforts monitor the premises to discover unknown hazards. Landowners that engage in those behaviors not only reduce the probability of an accident, but also substantially reduce their litigation costs and liability for the remaining accidents that still occur. Plaintiff asks this Court to change the longstanding and heretofore stable landscape of premises liability law, in contravention of stare decisis principles — and not via a straight or narrow path, but instead through the unwieldy and piecemeal expansion of the *Pimentel* exception, into a context that it was never intended to address. Landlords and businesses should be able to rely on the clear and longstanding precedent and standards for determining their rights and the merits of potential claims against them. Similarly, it is plain that there has been no change to the legal underpinnings of the traditional notice rule; to the contrary, the facts in *Pimentel* that necessitated and gave rise to an exception are glaringly absent here.

By contrast, a newly imposed general duty of care standard that plaintiff seeks would mean that significantly more cases would get to trial regardless of the defendant's conduct. In addition, the jury would be asked to make a general, open-ended judgment about the defendant's conduct instead of being asked to focus on the existence or non-existence of specific facts and evidence. This type of general judgment would enhance the well-known effects of "hindsight bias" and "outcome bias" on

the jury's decision.[1] For these reasons, imposing a new and more generalized duty to keep premises safe combined with an outcome in which a plaintiff was injured by an unsafe condition, comes close to imposing strict liability even though a negligence finding is still formally required.

Unlike the changes in methods of operations noted in the *Pimentel* opinion to justify a modification of the common law, nothing about the current state of society justifies enhancing premises liability. The current COVID-19 pandemic has demonstrated that it is now entirely possible for the average citizen to meet their needs without ever visiting a retail store or shopping center. Brick and mortar stores, entertainment venues, and restaurants have never been under greater economic pressure. There is no reason to impose additional litigation and accident costs on premises-based business now when this Court declined to do so when such business were thriving and the public had no reasonable alternative but to visit them.

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[1] Hindsight bias makes bad outcomes seem more predictable in hindsight than they were ex ante. Outcome bias induces us to assume that people who cause accidents have been careless. Philip G. Peters, Jr., *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 Ariz. St. L.J. 1277, 1277 (1999).

III. CONCLUSION

Because neither the *Pimentel* exception is inapplicable and principles of stare decisis and sound public policy favor retention of the tradition notice rule for premises liability, amicus WDTL respectfully requests that the Court continue to apply the notice rule in premises liability cases.

RESPECTFULLY SUBMITTED this 22nd day of January, 2021.

BETTS, PATTERSON & MINES, P.S.

By: _____
Daniel L. Syhre, WSBA #34158

WASHINGTON DEFENSE TRIAL LAWYERS

By: _____, WSBA#34158,
for Noah Jaffee *(per email authority)*
Noah Jaffe, WSBA No. 43454

Attorneys for Amicus Washington Defense Trial Lawyers

CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on January 22, 2021, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Amicus Curiae Brief Of Washington Defense Trial Lawyers; and**
- **Certificate of Service.**

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of January, 2021.

Valerie D Marsh

Valerie D. Marsh

BETTS, PATTERSON & MINES, P.S.

January 22, 2021 - 2:11 PM

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